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No. 07-1605

FILED
JUL 24 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

MICHIGAN FINANCIAL INVESTMENTS, L.L.C.,

Petitioner,

v.

DETROIT BUILDING AUTHORITY, CITY OF DETROIT, WAYNE COUNTY TREASURER,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Michigan

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257 TO REVIEW PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS VIOLATION CLAIM WHERE PETITIONER FAILED TO PROPERLY PRESENT THIS CLAIM TO THE STATE COURTS AND THE STATE COURTS FAILED TO DECIDE THIS ISSUE?

2. WHETHER PETITION LACKS STANDING WHERE IT SEEKS TO ASSERT THE ALLEGED FOURTEENTH AMENDMENT RIGHTS OF THE WAYNE COUNTY TREASURER AND NOT ITS OWN FOURTEENTH AMENDMENT RIGHTS?

3. WHETHER PETITIONER HAS SHOWN ANY VIOLATION OF ITS OWN FOURTEENTH AMENDMENT DUE PROCESS RIGHTS, WHERE THE MICHIGAN SUPREME COURT RELIED ON AN APRIL 2002 RULE PROMULGATED BY THE MICHIGAN STATE TAX COMMISSION, PROHIBITING THE FORECLOSURE OF PROPERTY OWNED BY A GOVERNMENTAL ENTITY, TO PRECLUDE PETITIONER FROM OBTAINING THE PROPERTY IN A PUBLIC AUCTION FIVE MONTHS LATER?

4. WHETHER PETITIONER HAS WAIVED ANY DEPRIVATION OF DUE PROCESS CLAIM?

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW – Continued

5. WHETHER PETITIONER HAS SHOWN THAT THE FEDERAL DUE PROCESS RIGHTS OF THE TREASURER WERE VIOLATED?

6. WHETHER THERE WAS AN ALTERNATIVE AND INDEPENDENT GROUND TO SUSTAIN THE TRIAL COURT'S JUDGMENT?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent City of Detroit is a Michigan municipal corporation which has no parent company and no corporate stock.

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW	i
CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6	iii
TABLE OF AUTHORITIES	vi
CITATIONS OF THE OFFICIAL AND UNOFFICIAL OPINIONS AND ORDERS ENTERED IN THE CASE BY THE LOWER COURT	1
COUNTER-STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED	2
COUNTER-STATEMENT OF THE CASE	5
REASONS FOR DENYING THE WRIT	15
I. THE FEDERAL QUESTION POSED AND BRIEFED BY PETITIONER WAS NOT PROPERLY PRESENTED AND PRESERVED IN THE STATE COURTS	17
II. PETITIONER LACKS CONSTITUTIONAL STANDING AS IT SEEKS TO ASSERT THE ALLEGED FOURTEENTH AMENDMENT RIGHTS OF AN OPPOSING LITIGANT, THE WAYNE COUNTY TREASURER, AND NOT ITS OWN FOURTEENTH AMENDMENT RIGHTS	20

TABLE OF CONTENTS – Continued

		Page
III.	PETITIONER ALSO FAILS TO SHOW THAT THE APPLICATION OF MICH. COMP. LAWS § 211.78(G)(1) AND THE STATE TAX COMMISSION RULE TO THE PUBLICLY OWNED GARAGE, RETROACTIVELY DIVESTED THE COUNTY TREASURER OF A VESTED PROPERTY RIGHT, IN VIOLATION OF THE TREASURER'S FOURTEENTH AMENDMENT RIGHTS	24
IV.	THE PETITION SHOULD BE DENIED AS THE TRIAL COURT'S JUDGMENT CORRECTLY SET ASIDE THE TREASURER'S FORFEITURE AND FORECLOSE OF THE PUBLIC GARAGE ON AN INDEPENDENT GROUND	30
CONCLUSION		32

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson,
520 U.S. 83 (1997) 17, 19

Baker v. State Land Office Board,
293 N.W. 763 (Mich. 1940) 28

Board of Directors of Rotary International v. Rotary Club of Duarte,
481 U.S. 537 (1987) 17, 19

Broderick v. Oklahoma,
413 U.S. 601 (1973) 22

Cardinale v. Louisiana,
394 U.S. 437 (1969) 2

City of Detroit v. Walker,
520 N.W.2d 135 (Mich. 1994) 28

Dow v. Michigan,
240 N.W.2d 450 (Mich. 1976) 31

Exxon Corp. v. Eagerton,
462 U.S. 176 (1983) 2, 19

Fuller v. Oregon,
417 U.S. 40 (1974) 19

Gibbes v. Zimmerman,
290 U.S. 326 (1933) 2

Hanson v. Denckla,
357 U.S. 235 (1958) 19

Howell v. Mississippi,
543 U.S. 440 (2005) 2, 17

TABLE OF AUTHORITIES – Continued

Page

In re Petition by Wayne Co. Treasurer,
732 N.W.2d 458 (Mich. 2007) 31

Jones v. Flowers,
547 U.S. 220 (2006) 31

Jorge Aledo-Garcia v. Puerto Rico National Guard Fund,
887 F.2d 354 (1st Cir. 1989) 29

Kent County Aeronautics Board v. Michigan Department of State Police,
609 N.W.2d 593 (Mich. Ct. App. 2000) 23

Linc Finance Corp. v. Onwuteaka,
129 F.3d 917 (7th Cir. 1997) 21

Los Angeles Police Department v. United Reporting Publishing Corp.,
528 U.S. 32 (1999) 22

Mayor of Detroit v. Arms Technology, Inc.,
669 N.W.2d 845 (Mich. Ct. App. 2003) 23

McGowan v. Maryland,
366 U.S. 420 (1961) 22

McPherson v. Kelsey,
125 F.3d 989 (6th Cir. 1997), cert. den.,
523 U.S. 1050 (1998) 21

Mennonite Bd. of Missions v. Adams,
462 U.S. 791 (1983) 31

Moore v. LaFayette Life Ins. Co.,
458 F.3d 416 (6th Cir. 2006) 21

Muirhand v. Sands,
69 N.W. 826 (Mich. 1897) 28

TABLE OF AUTHORITIES – Continued

Page

New York v. Ferber,
458 U.S. 747 (1982) 22

People v. Crall,
510 N.W.2d 182 (Mich. 1993) 16

Pohutski v. City of Allen Park,
641 N.W.2d 219 (Mich. 2002) 28

Radio Station WOW, Inc. v. Johnson,
326 U.S. 120 (1945) 19

Re Certified Questions,
331 N.W.2d 456 (1982) 14

Sidun v. Wayne County Treasurer,
___ N.W.2d ___ (Michigan Supreme Court
No. 131905, released July 2, 2008) 31

State Treasurer v. Schuster,
572 N.W.2d 628 (Mich. 1998) 27

Travis v. Preston,
643 N.W.2d 235 (Mich. Ct. App. 2002) 28

U.S. v. Raines,
362 U.S. 17 (1960) 22

U.S. v. Carlton,
512 U.S. 26 (1994) 29

Webb v. Webb,
451 U.S. 493 (1981) 2, 18

Webster v. Auditor General,
80 N.W. 705 (Mich. 1899) 28

Ziegler v. Simmons,
91 N.W.2d 819 (Mich. 1958) 25

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION AND STATUTES

U.S. Const. amend. XIV ..... *passim*
U.S. Const. art. 1 § 10, cl. 1 ..... 13, 14, 19
1963 Mich. Const. art. 1 § 17 ..... 10, 18
Michg. Comp. Laws § 123.951 14
Mich. Comp. Laws § 123.954 5
Mich. Comp. Laws § 123.958 5
Mich. Comp. Laws § 123.963 5
Mich. Comp. Laws § 211.25(e) 6
Mich. Comp. Laws § 211.27a(8) 5, 6, 26
Mich. Comp. Laws § 211.78 23
Mich. Comp. Laws § 211.78(1) 27
Mich. Comp. Laws § 211.78(3) 26
Mich. Comp. Laws § 211.78b 8
Mich. Comp. Laws § 211.78c 8
Mich. Comp. Laws § 211.78f 8
Mich. Comp. Laws § 211.78g 8, 27
Mich. Comp. Laws § 211.78g(1) ..... *passim*
Mich. Comp. Laws § 211.78g(2) 27
Mich. Comp. Laws § 211.78i 8
Mich. Comp. Laws § 211.78i(6)(c) 7, 31
Mich. Comp. Laws § 211.78i(6)(d) 7, 31
Mich. Comp. Laws § 211.78i(7) 8

TABLE OF AUTHORITIES – Continued

Page

Mich. Comp. Laws § 211.371 ..... 10, 11, 26, 27, 28

Mich. Comp. Laws § 211.372 11

1948 Mich. Pub. Acts 31 5

1999 Mich. Pub. Acts 123 7

2001 Mich. Pub. Act 94 8

28 U.S.C. § 1257 i

28 U.S.C. § 1257(a) 1, 17

COURT RULES

Sup. Ct. R. 10 15

CITATIONS OF THE OFFICIAL AND UNOFFICIAL OPINIONS AND ORDERS ENTERED IN THE CASE BY THE LOWER COURT

The list of lower court citations set forth at page 1 of the Petition is correct.

COUNTER-STATEMENT OF JURISDICTION

The procedural history of the case appearing at page one of the Petition is correct. However, Respondent City of Detroit submits that this Court does not have federal question jurisdiction under 28 U.S.C. § 1257(a). Respondent submits that the purported federal question posed in the Petition for Writ of Certiorari did not arise in the record below. Petitioner failed to raise the one federal claim that it now presents to this Court prior to the Michigan Supreme Court's summary order of September 28, 2007. The Michigan Supreme Court failed to rule on that issue in that order or in its order denying rehearing.

In the state courts, Petitioner Michigan Financial Investments, L.L.C. asserted no express violation of its own rights protected by the Fourteenth Amendment to the United States Constitution, and no express violation of the due process rights of the Wayne County Treasurer under the Fourteenth Amendment, prior to the Michigan Supreme Court's peremptory decision of September 28, 2007. Petitioner's pleadings and other filings contained no

reference to the Fourteenth Amendment to the United States Constitution or even to the counterpart due process clause of the 1963 Michigan Constitution.

In its order summarily disposing of the case, the Michigan Supreme Court did not mention or discuss the Fourteenth Amendment to the federal Constitution, or the term due process of law. The federal question now posed by Petitioner was also not decided in the Michigan Supreme Court's order denying the Petitioner's motion for rehearing, which was entered on March, 2008. Under these circumstances, federal question jurisdiction is wanting. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n. 3 (1983); *Webb v. Webb*, 451 U.S. 493, 497-500 (1981); *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969); *Gibbes v. Zimmerman*, 290 U.S. 326, 328 (1933).

To the extent that this presentation requirement is deemed as prudential, rather than jurisdictional, the petition should be denied for Petitioner's failure to met its burden of showing that the federal issue posed was properly presented in the state court. *Howell v. Mississippi*, 543 U.S. 440, 443-445 (2005).

CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED

The Fourteenth Amendment to the United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mich. Comp. Laws § 211.78g(1)

Except as otherwise provided in this subsection, on March 1 in each tax year, certified abandoned property and property that is delinquent for taxes, interest, penalties, and fees for the immediately preceding 12 months or more is forfeited to the county treasurer for the total amount of those unpaid delinquent taxes, interest, penalties, and fees. If property is forfeited to a county treasurer under this subsection, the foreclosing governmental unit does not have a right to possession of the property until the April 1 immediately succeeding the entry of a judgment foreclosing the property under section 78k or in a contested case until 22 days after the entry of a judgment foreclosing the property under section 78k. If property is forfeited to a county treasurer under this subsection, the county treasurer shall add a $175.00 fee to each parcel of property for which those delinquent taxes, interest, penalties, and fees remain unpaid. A county treasurer shall withhold a parcel of property from forfeiture for any reason determined by the state tax commission. The procedure for withholding a parcel of property from forfeiture under this

subsection shall be determined by the state tax commission.

Michigan State Tax Commission Bulletin
Dated April 17, 2002

Reasons to Withhold a Parcel of Property From Forfeiture and Procedures for Withholding a Property From Forfeiture.

The State Tax Commission, at its meeting on April 17, 2002, determined that the following are the reasons that a parcel of property shall be withheld from forfeiture:

* * *

2) A property owned by the U.S. Government, the State of Michigan, a county, a city, a village or a township shall be withheld from forfeiture.

Procedure: If the property is forfeited in error, the County Treasure removes all of the fees attached to the parcel, files a certificate of cancellation of forfeiture (form 3839) with the Register of Deeds. Notifies the State Treasurer and the contractor of the error. The State Treasurer will withhold the parcel from foreclosure and stop all title work on the parcel.

COUNTER-STATEMENT OF THE CASE

As required by the Michigan Building Authority Act, 1948 Mich. Pub. Acts 31 as amended, Mich. Comp. Laws § 123.954, the Detroit Building Authority (hereinafter referred to as DBA) has acquired, constructed, and leased parking facilities to the City of Detroit via supplements to a 1985 master lease known as Contract of Lease No. 2. As required by the Act, it will convey title to the facilities to the City at the end of the lease term or at the conclusion of its financing. *See* Mich. Comp. Laws § 123.958; Mich. Comp. Laws § 123.963. Under its lease and the Act, the City is the residual and beneficial owner of the leased properties. It enjoys a vested future interest in the properties.

On May 29, 1997, the DBA purchased property from Fox Parking for the price of three million dollars. When acquired by the DBA, the property was comprised of two lots and contained a surface parking lot. The DBA recorded the deed to the two lots in the Wayne County Register of Deeds' Office on June 25, 1997. The recorded deed provided two distinct, full legal descriptions, with two respective street address and local property tax identification numbers. The Wayne County Register of Deeds was required by Mich. Comp. Laws § 211.27a(8) to notify the assessor of the local taxing authority of the conveyance and make the deed available to Wayne County's tax equalization department within 30 days of the recording.

After it purchased the property, the DBA supplied the City of Detroit Assessor with the property transfer affidavit required by Mich. Comp. Laws § 211.27a(8), a section of the Michigan General Property Tax Act (hereafter may be referred to as the GPTA). The affidavit correctly provided the two property tax identification numbers for the parcels and claimed that the parcels were statutorily exempt from taxation since their purchase by the City of Detroit Building Authority.

On November 13, 1997, the DBA requested the City Assessor to make the City of Detroit Municipal Parking Department the taxpayer of record on the City tax assessment roll. By December 2, 1997, the City Assessment roll had been adjusted to reflect that the taxpayer of record for both parcels was the City of Detroit Parking Department.

The DBA also requested the City Assessor to combine the two parcels into a single tax parcel with the known street address of 450 West Congress, as is authorized by Michigan Compiled Laws § 211.25(e). By February 1998, the City Assessor combined the two tax parcels into one tax parcel for property tax purposes. After the combination, the City assessment roll retained the two legal descriptions of the parcels.

It was later learned that Fox Parking had not paid Wayne County property taxes on one of the lots for the 1997 tax year. The DBA was responsible for a portion of the 1997 property taxes based on a prorated basis from the date of its acquisition.

The DBA subsequently financed and constructed a ten-storied public parking garage known as the Millennium Garage. The DBA leased the Millennium Garage to the City under the Master Lease. The City of Detroit Municipal Parking Department occupied and operated the Garage since its opening.

In 1999 Mich. Pub. Acts 123, the Michigan Legislature enacted sweeping changes to its property tax collection system. One of the changes empowered county treasurers for the first time to elect to assume the role of collecting delinquent county property tax collection, which theretofore had exclusively been performed by the State of Michigan, through the Michigan Department of Treasury and the Michigan Attorney General. In 2000, the Wayne County Treasurer assumed the role of delinquent property tax collector for the first time.

Mich. Comp. Laws § 211.78i(6)(c) and (d) required the County Treasurer to review the tax records in the office of the City Assessor or City Treasurer in ascertaining persons with an interest in tax delinquent property. As was found by the trial court below, it was undisputed that the County Treasurer did not review the records of the City Assessor or City Treasurer in ascertaining the identity of persons with an interest in the garage property. On April 16, 2001, the Wayne County Treasurer recorded a certificate of forfeiture of one parcel corresponding to the western half of the high rise Garage for the unpaid 1997 property taxes. The Treasurer did not provide the City of Detroit with pre-forfeiture notices as required

by Mich. Comp. Laws § 211.78b, § 211.78c, and § 211.78f.

The County Treasurer filed suit to foreclose the garage property and numerous other properties on June 14, 2001, in Wayne County Circuit Court No. 01-012001PZ. The County Treasurer did not serve the City with process or with notices of the administrative hearing required by Mich. Comp. Laws § 211.78i(7) or the judicial hearing required by Mich. Comp. Laws § 211.78i.

On July 27, 2001, 2001 Mich. Pub. Act 94, Mich. Comp. Laws § 211.78g, was enacted. That act provided as follows:

> A county treasurer shall withhold a parcel of property from forfeiture for any reason determined by the state tax commission. The procedure for withholding a parcel of land from forfeiture under this subsection shall be determined by the state tax commission.

Wayne County Circuit Court Judge Mary Beth Kelly entered a judgment of foreclosure on the garage property and numerous other properties on March 4, 2002.

On April 17, 2002, the State Tax Commission issued a bulletin identifying which properties were to be withheld from forfeiture by county treasurers. The Bulletin required that publicly owned property be withheld from forfeiture. The Bulletin provided that if publicly held land had been forfeited, the Treasurer was to file a certificate of forfeiture.

The Wayne County Treasurer scheduled the western half of the Millennium Garage to be sold at its annual tax sale on September 26, 2002, five months after the issuance of the tax bulletin. The Treasurer published "Rules and Regulations for the Sale of Tax Foreclosed Properties" in August 2002. Rule 4 expressly provided that "the Wayne County Treasurer reserves the right to reject any or all bids." The successful bidder, Petitioner Michigan Financial Investments, L.L.C., bid $370,000.00.

Three days after the auction, the DBA filed the instant suit to enjoin the transfer of the garage property to Michigan Financial Investments and set aside the tax foreclosure judgment. The City joined the action as a plaintiff.

After being sued by the DBA and the City in the instant case, and before a deed had issued, the Wayne County Treasurer canceled the sale of the Garage property effective November 14, 2002. The Treasurer indicated that the "property had been sold in error."

The County issued a check on November 13, 2002, to MFI in the amount of $370,000.00. On November 14, 2002, the City redeemed the property by paying $4,395.19. In May 2003, the Wayne County Treasurer recorded a certificate of redemption which discharged the certificate of forfeiture on April 16, 2001.

In its motion for summary disposition filed on June 25, 2003, the City contended that the County Treasurer was precluded by Mich. Comp. Laws

§ 211.78g(1), Mich. Comp. Laws § 211.371 and the State Tax Commission Bulletin from forfeiting, foreclosing and auctioning public property. It also argued that it had been deprived of its vested property interest in the garage property and deprived of its statutory right to redeem, without notice and a hearing, in violation of the procedural due process guarantees of the Fourteenth Amendment and the Michigan constitution.

Petitioner Michigan Financial responded to the City's motion on July 25, 2003. While Petitioner argued that the Bulletin should not be applied retroactively, its arguments were based on state law regarding construction of statutes. Petitioner raised no argument that a retroactive application would violate its rights or the County Treasurer's rights under the due process guarantees of the Fourteenth Amendment to the United States Constitution or the due process clause of Mich. Const. art. 1, § 17.

In an opinion and final order entered on December 1, 2003, the trial court ruled that the County Treasurer had deprived the City of identifiable, substantial property interests without affording the City pre-deprivation notice and hearing required by procedural due process guarantees and by state statute. The trial court determined that since the City already tendered the redemption price to the Treasurer, there was no need to provide for a redemption period. The trial court further stated at page 27, note 10, of its opinion that its "resolution of the City's due process arguments moots consideration of

whether the County Treasurer was empowered, sua sponte, to revoke the sale of the Subject Parcel under the authority of a certain State Tax Commission Bulletin issued in April 2002," and for that reason, it would not address the parties' arguments concerning the application of the Bulletin.

Significantly, the Wayne County Treasurer did not appeal from the trial court's judgment which set aside the foreclosure. Michigan Financial filed an appeal to the Michigan Court of Appeals. The County Treasurer did not support any of the positions taken by Michigan Financial in the Michigan Court of Appeals.

On appeal to the Michigan Court of Appeals, the City argued in its Brief for Appellee, pages viii, 18-21, and 40, filed on July 1, 2004, that the trial court's judgment in favor of the City could be affirmed on the alternative ground that the State Tax Commission Bulletin, Mich. Comp. Laws § 211.78g(1), Mich. Comp. Laws § 211.371, and Mich. Comp. Laws § 211.372, barred the County Treasurer from forfeiting, foreclosing, and auctioning the public garage property. The Appellee City maintained at pages 21-22 that the treasurer knew or reasonably should have known from the recorded deed from Fox to the DBA and from the City's assessments records that the garage property was publicly owned.

The Wayne County Treasurer did not challenge the application of the State Tax Commission Bulletin in the Michigan Court of Appeals. Michigan Financial

did not challenge the application of the State Tax Commission Bulletin in the Michigan Court of Appeals.

On July 5, 2005, the Michigan Court of Appeals issued an unpublished opinion which reversed the decision of the trial court and remanded for further proceedings. In a two to one vote, the Court ruled that the trial court erred in holding that the County Treasurer deprived the City of a vested property interest in violation of procedural due process guarantees. The Court of Appeals did not address the alternative grounds raised by the City for affirmance of the trial court, namely, that the application of the State Tax Commission Bulletin prohibited the forfeiture of publicly owned property.

On October 24, 2005, the City of Detroit and the Detroit Building Authority filed applications for leave to appeal to the Michigan Supreme Court. In its application, the City asserted that the Michigan Court of Appeals erred in ruling that the County Treasurer had not violated the City's procedural due process rights. The Appellant City also asserted that it was entitled to relief because the Wayne County Treasurer had been prohibited from forfeiting, foreclosing upon, and auctioning publicly owned property under state statute and the Tax Commission Bulletin. The Detroit Building Authority raised essentially the same issues as the Appellant City. The Wayne County Treasurer did not oppose these applications.

Petitioner Michigan Financial Investments responded to the City of Detroit's application on November 14, 2005. Petitioner's response to the City's application made no argument that either its own rights under the Fourteenth Amendment to the United States constitution, or the County Treasurer's rights under the Fourteenth Amendment to the United States constitution, had been violated by a retroactive active application of the State Tax Commission Bulletin. At pages 40-42 of its response, it cursorily argued that its rights under the federal contract clause, U.S. Const. art. 1, § 10, cl. 1, had been violated. Michigan Financial also filed an application for leave to appeal to the Michigan Supreme Court but raised no federal claim. (Michigan Supreme Court Docket No. 129743).

On September 28, 2007, the Michigan Supreme Court disposed of the three applications by the issuance of three identical, peremptory orders. The three orders contained just four sentences. The Supreme Court ordered that, in lieu of granting the applications for leave to appeal, "we reverse the judgment of the Court of Appeals and reinstate the order of the Wayne County Circuit Court setting aside the foreclosure sale and quieting title to the property in the plaintiff." The peremptory order contained the following two sentence discussion:

> Contrary to the Court of Appeals majority's conclusion, the Wayne County Treasurer had reason to know that the property was publicly owned because there is no dispute

> that the plaintiff Detroit Building Authority, which was incorporated by the intervening plaintiff City of Detroit, Mich. Comp. Laws § 123.951, was the owner of record and had filed both a deed and an affidavit of property transfer notifying the county that the property was tax exempt.

Petitioner filed a motion for reconsideration on October 16, 2007. It claimed that the Michigan Supreme Court retroactively applied the Tax Bulletin in a manner violative of Michigan law announced in *Re Certified Questions*, 331 N.W.2d 456 (1982). (Motion for Reconsideration, pp. 8-11). It maintained that the Wayne County Treasurer had been improperly divested of his property interest in the land. At page 15 of its motion, Michigan Financial Investment cursorily claimed that the Supreme Court's order violated its own rights under the contract clause of the federal constitution, art. 1, § 10, cl. 1. At page 16 of its motion, Michigan Financial cursorily contended for the first time that the Supreme Court violated its own due process rights guaranteed by the Fifth and Fourteenth Amendments. It cited to no federal case law.

In its response to Michigan Financial's motion for reconsideration, the City maintained that Michigan Financial had no standing to assert any legal interests or rights of the County Treasurer. (City of Detroit's Answer to Motion for Reconsideration, pp. 2-6). It also pointed out that the Supreme Court had not retrospectively applied the Bulletin to the auction sale of September 26, 2002, because the Bulletin was

issued five months prior to the auction sale. In addition, it contended in the alternative that the Bulletin related to procedures and remedies for the collection of a delinquent property tax, and could properly be applied in retroactive manner under established state law.

REASONS FOR DENYING THE WRIT

Summary

Petitioner Michigan Financial Investments, L.L.C., has not satisfied the criteria for a grant of certiorari set forth in Sup. Ct. R. 10. Petitioner has not established that the four-sentence order of the Michigan Supreme Court regarding to the Tax Commission Bulletin decided a federal question of law at all, much less an important federal question, in a manner that conflicted with decisions of the United States Court of Appeals or with decisions of this Court.

As discussed in Section I below, the Petitioner did not properly present or preserve the federal question now posed by timely citing or relying upon the Fourteenth Amendment to the federal constitution in the state courts. The Michigan Supreme Court's order of peremptory reversal and order denying reconsideration did not mention or pass upon the Fourteenth Amendment rights of the Petitioner or the Wayne County Treasurer.

The Michigan Supreme Court's peremptory reversal has limited precedential value and limited federal significance, assuming arguendo that Petitioner's federal claim had been timely presented and passed on. The Supreme Court's explanation of its holding was confined to two sentences. It is open to question whether this two-sentence explanation can serve as binding precedent. *See generally People v. Crall*, 510 N.W.2d 182, n. 8 (Mich. 1993) (a summary order is binding precedent where it contains a statement of the applicable facts and reason for the decision). This case is also uniquely fact bound. The Michigan Supreme Court's summary order relative to the State Tax Commission Bulletin will likely have no effect on persons other than the parties to this case. At most, the Michigan Supreme Court's peremptory order will effect only a handful of Michigan county treasurer tax foreclosures of public property that may have occurred during the two-year period prior to April 2002. The result reached by the Michigan Supreme Court is also sustained on other, independent grounds contained in the reinstated judgment of the trial court.

Lastly, the legal arguments advanced by Petitioner are unprevailing, as 1) Petitioner lacks standing to assert the alleged federal due process rights of the Wayne County Treasurer, which were waived by the Treasurer below, and 2) the State Tax Commission rule was not applied here in a retroactive manner that deprived the Petitioner or the County

Treasurer of a vested property interest without procedural due process.

I. THE FEDERAL QUESTION POSED AND BRIEFED BY PETITIONER WAS NOT PROPERLY PRESENTED AND PRESERVED IN THE STATE COURTS.

Petitioner failed to carry its burden of showing that the federal question it raises and briefs in its Petition for Certiorari was properly presented to the Michigan Supreme Court. Accordingly, this Court should not grant the Petition for Certiorari.

This Court does not review a final judgment of a state court under 28 U.S.C. § 1257(a) unless the record as a whole shows that the federal claim was adequately presented in the state system. *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). It is necessary for the petitioner to have clearly cited in his state court petition the federal source of law on which he relies, or a case deciding such a claim on federal grounds. *Howell v. Mississippi*, 543 U.S. 440, 443-445 (2005); *Adams v. Robertson*, 520 U.S. 83, 89 (1997). As noted in *Howell*, 543 U.S. 444, n. 2, "'[P]assing invocations of 'due process' that 'fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment' do not meet our minimal requirement that it must be clear that a federal claim was presented,'" citing *Adams*, 520 U.S. 89, n. 3. Particularly where state constitutions contain counterpart provisions to

the federal constitution, a petitioner must demonstrate that he clearly invoked the federal provision in state court, or else the state court will be viewed as having considered the constitutional challenge to be based in the state constitution. *Webb*, 451 U.S. 496-498.

Here, the Petitioner failed to cite the Fourteenth Amendment as a basis for a federal claim in the lower state courts or in the Michigan Supreme Court prior to September 28, 2007. Petitioner asserted no express violation of its own rights protected by the Fourteenth Amendment to the federal Constitution, and no express violation of the due process rights of the Wayne County Treasurer under the Fourteenth Amendment, prior to the Michigan Supreme Court's peremptory decision of September 28, 2007. Petitioner's pleadings and other filings contained no reference to the Fourteenth Amendment to the federal constitution or even to the counterpart due process clause of the 1963 Mich. Const. art. 1, § 17. Neither Petitioner's Brief in Opposition to the City's Application for Leave to Appeal to the Michigan Supreme Court nor the Petitioner's Brief in Opposition to the Detroit Building Authority Application for Leave to Appeal, cited to the Fourteenth Amendment or asserted federal due process rights.

The Michigan Supreme Court did not mention or discuss the Fourteenth Amendment to the federal constitution, or even the term "due process of law" in its order summarily disposing of the case.

Petitioner indicates at page 11 of its Petition that it preserved a Fourteenth Amendment claim in its motion for reconsideration filed in the Michigan Supreme Court on October 17, 2007. Petitioner's motion for reconsideration argued at pages 15-16 that the Supreme Court's order violated it's own rights under U.S. Const. art. 1, § 10, cl. 1 (providing that no state shall pass any law impairing the obligation of contracts). Petitioner also made oblique references to its federal procedural and substantive due process rights.

However, this Court has ruled that it will generally refuse "to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question." *Adams*, 520 U.S. 89, n. 3, citing *Board of Directors of Rotary International*, 481 U.S. 549-550; *Hanson v. Denckla*, 357 U.S. 235, 244, n. 4 (1958); and *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945). In *Board of Directors of Rotary International*, 481 U.S. 537, this Court refused to consider a federal claim that was first squarely raised in the state appellate court in a petition for rehearing where the state court denied the petition for rehearing without opinion. It held that when "'"the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."'" citing *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n. 3 (1983) (quoting *Fuller v. Oregon*, 417 U.S. 40, 50,

n. 11 (1974) (in turn quoting *Street v. New York*, 394 U.S. 576, 582 (1969)).

The Michigan Supreme Court was indeed silent on the federal question now posed by Petitioner in its order denying the Petitioner's motion for reconsideration. It did not refer to the Fourteenth Amendment or to Petitioner's due process rights. Thus, this Court should refuse to consider the argument obliquely raised for the first time in Petitioner's motion for reconsideration.

II. PETITIONER LACKS CONSTITUTIONAL STANDING AS IT SEEKS TO ASSERT THE ALLEGED FOURTEENTH AMENDMENT RIGHTS OF AN OPPOSING LITIGANT, THE WAYNE COUNTY TREASURER, AND NOT ITS OWN FOURTEENTH AMENDMENT RIGHTS.

Petitioner Michigan Financial Investments now asserts that the alleged retroactive application of the State Tax Commission Bulletin deprived the Wayne County Treasurer of his vested right in the foreclosure judgment without procedural due process guarantees of the federal constitution. However, Petitioner may not seek review on this ground because it has no standing to assert the federal due process rights of another.

It must be noted that Petitioner has not properly presented in this Court any claim that it has been

deprived of its own property rights without procedural due process. Petitioner did mount a defensive argument as appellee in the Michigan Supreme Court that a retroactive application of the Tax Bulletin would impair its own contract rights under the auction sale agreement, without citation to any federal source or authority. (Brief in Response to the City's Application for Leave to Appeal, p. 40). And, as stated above, Petitioner's motion for reconsideration of the peremptory order cited the Contract Clause and claimed that its rights thereunder were violated by the peremptory order. Petitioner framed its statement of question presented for review as whether that the Michigan Supreme Court denied "its" constitutional right to due process of law. (Petition for Writ of Certiorari, p. i). However, Petitioner failed to brief or otherwise develop any legal authority in support of its perfunctory statement that "its" own federal due process rights had been violated. By failing to adequately brief and cite legal authority in support of the issue of a deprivation of its own Fourteenth Amendment rights, Petitioner has waived and abandoned that issue in this Court. *See generally Moore v. La-Fayette Life Ins. Co.*, 458 F.3d 416, 448 (6th Cir. 2006); *Linc Finance Corp. v. Onwuteaka*, 129 F.3d 917, 921 (7th Cir. 1997); *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997), cert. den., 523 U.S. 1050 (1998).

Petitioner has no standing to now claim that the retroactive application of the Tax Bulletin violated

the Fourteenth Amendment due process rights of the Wayne County Treasurer.

It is a cardinal rule that constitutional rights are personal in nature. *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32, 39 (1999); *New York v. Ferber*, 458 U.S. 747, 767 (1982); *McGowan v. Maryland*, 366 U.S. 420, 429 (1961). In light of the general rule that a litigant may only assert his own constitutional rights or immunities, a litigant has no standing to assert the constitutional rights of others. *Broderick v. Oklahoma*, 413 U.S. 601, 610 (1973); *U.S. v. Raines*, 362 U.S. 17 (1960).

Under this general principle of constitutional standing, the constitutional rights of the Wayne County Treasurer are personal to the Office of the County Treasurer. Petitioner Michigan Financial Investments thus lacks standing to assert the personal constitutional rights of the Office of the Wayne County Treasurer. The very few exceptions to the traditional rule of constitutional standing, such as the First Amendment overbreadth doctrine, are factually inapplicable to this case, and have not, at any rate, been pleaded or otherwise raised by Petitioner in the lower courts.

The jurisprudential concerns underlying the rules of standing resonate in this case, where the legal interests of the Treasurer and Petitioner are conflicting and where the Treasurer waived any procedural due process claim he hypothetically may have had. The Treasurer never challenged the State's

issuance of the Tax Commission Bulletin or its application to the Garage property. The defendant Wayne County Treasurer never asserted a claim or argument that the application of the State Tax Commission Rule to the publicly owned garage deprived him of a vested property right. Indeed, it is debatable whether the Treasurer even had standing to mount a due process challenge to a retroactive application of Mich. Comp. Laws § 211.78 and the Bulletin. *See generally Mayor of Detroit v. Arms Technology, Inc.*, 669 N.W.2d 845, 856-858 (Mich. Ct. App. 2003); *Kent County Aeronautics Board v. Michigan Department of State Police*, 609 N.W.2d 593, 603 (Mich. Ct. App. 2000).

The County Treasurer consistently took the position that on November 14, 2002, it lawfully exercised its contract right to cancel the September 26, 2002, auction sale to Petitioner, prior to the conveyance of any deed to Petitioner. The Petitioner's sale contract with the Treasurer was subject to the law in effect at the time of the September 26, 2002, auction sale and hence subject to Mich. Comp. Laws § 211.78g(1), and the State Tax Commission Rules enacted on April 17, 2002. The County Treasurer advised Petitioner Michigan Financial that the auction sale was cancelled and issued a $370,000.00 check to Michigan Financial on November 13, 2002.

On November 14, 2002, the County Treasurer accepted the payment of the redemption amount of $4,395.19, from the Detroit Building Authority and the City of Detroit. In May 2003, the Treasurer recorded a redemption certificate to the City of

Detroit, which discharged the certificate of forfeiture recorded on April 16, 2001. In short, the Treasurer's actions in cancelling the sale to petitioner and in discharging the certificate of forfeiture, complied with the State Tax Commission Rules that directed the setting aside of forfeited public property. The County Treasurer did not appeal from the trial court's final opinion and judgment of December 1, 2003, which declared that the foreclosure judgment and the subsequent Treasurer's sale to Michigan Financial were set aside (opinion, p. 28). By not challenging the State's issuance of the Tax Commission Bulletin or the application of the Rule to the Garage Property, the Treasurer waived any hypothetical due process claim he may have had.

III. PETITIONER ALSO FAILS TO SHOW THAT THE APPLICATION OF MICH. COMP. LAWS § 211.78(G)(1) AND THE STATE TAX COMMISSION RULE TO THE PUBLICLY OWNED GARAGE, RETROACTIVELY DIVESTED THE COUNTY TREASURER OF A VESTED PROPERTY RIGHT, IN VIOLATION OF THE TREASURER'S FOURTEENTH AMENDMENT RIGHTS.

As argued by the City and the Detroit Building Authority in the three levels of state courts, the County Treasurer was precluded by state law from forfeiting and auctioning the public property to Petitioner, Michigan Financial Investment. The Michigan Supreme Court agreed with the City and the DBA.

As stated above, the Michigan Supreme Court's orders were silent on any issue as to whether the Treasurer's Fourteenth Amendment rights were violated by a retroactive application of the Tax Bulletin. Petitioner's arguments regarding unconstitutional retroactivity are devoid of merit and the Michigan Supreme Court would have been entitled to reject them out of hand.

The terms of the Bulletin itself were retrospective. It instructed what must be done where property already has been forfeited. The Bulletin provides that where a Parcel not subject to forfeiture actually is forfeited, the County Treasurer shall remove all of the fees attached to the parcel, file a certificate of cancellation of forfeiture with the register of Deeds, and notify the State Treasurer. Under Mich. Comp. Laws § 211.78(g)(1) and its implementing Bulletin, the subject parcel was not subject to forfeiture.

The City argued below that the Bulletin really did not bring about a new change of the law in the first place. Section 371 of the GPTA prohibits the sale of publicly owned land which is acquired by tax foreclosure proceedings where that ownership can be discovered as a matter of public record before the sale. Public ownership under § 371 includes property owned by a public corporation like the DBA. In *Ziegler v. Simmons*, 91 N.W.2d 819, 822-823 (Mich. 1958), the Michigan Supreme Court held that the word "discover" used in § 371 "would necessarily include constructive notice by recording."

The Wayne County Treasurer, under the 1999 amendments to GTPA, has replaced the state agencies (Treasurer and Department of Natural Resources), which for decades foreclosed upon county taxes, acquired title, and sold at auction or otherwise disposed of land. A county, known under the amended GTPA as the "foreclosing governmental unit" (FGU), stands in the shoes once occupied by the state of Michigan in tax foreclosure proceedings.

The legislature did not repeal Mich. Comp. Laws § 211.371 when it adopted the 1999 amendments to the GTPA. That fact is significant given that the 1999 act repealed over a number of years, numerous other inconsistent or obsolete provisions. Mich. Comp. Laws § 211.371 must be read and applied in light of legislature's decision to not repeal that section. Mich. Comp. Laws § 211.371 must be applied to FGUs like Wayne County which have taken over the role and functions long performed by state treasurer and the Michigan Department of Natural Resources.

Application of Mich. Comp. Laws § 211.371 to FGUs like Wayne County is supported by the fact that the revised GTPA allows a county to elect to have the state foreclose and sell property. Mich. Comp. Laws § 211.78(3). Where a county elects under Mich. Comp. Laws § 211.78(3) to have the state foreclose on tax delinquent property, the state would be bound to

follow Mich. Comp. Laws § 211.371.[1] A FGU is performing a function that prior to 1999 could only be performed by the state. It would be anomalous, indeed repugnant to the very purpose and intent of the GTPA, to hold that Section 371 does not apply to FGUs when it would apply to the state performing the same function in lieu of an FGU.

The legislative policy to not sell publicly owned land is reflected in the legislative purpose of the 1999 GPTA changes:

> The legislature finds that there exists in this state a continuing need to strengthen and revitalize the economy of this state and its municipalities by encouraging the efficient and expedient return to productive use of property returned for delinquent taxes. Therefore, the powers granted in this act relating to the return of property for delinquent taxes constitute the performance by this state or a political subdivision of this state of essential public purposes and functions. Mich. Comp. Laws § 211.78(1).

Section 78(1) of the GPTA must be read in pari materia and harmonized with Section 371 of that same act. *See State Treasurer v. Schuster*, 572 N.W.2d

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[1] Where a county elects to have the state foreclose upon (and later sell such property), after forfeiture to the county treasurer under § 78g, the county treasurer "shall immediately transmit to the state treasurer a copy of each certificate recorded under this section." Mich. Comp. Laws § 211.78g(2).

628 (Mich. 1998). Likewise, § 371 must be read in pari materia with the Tax Commission Bulletin barring even the forfeiture of public land.

Moreover, a retroactive application of the Bulletin could not violate any vested rights of the Treasurer as the Bulletin was a procedural, remedial, and curative change in the tax law which may be given retroactive effect.

In the absence of any language indicating retroactive effect, a statute is presumed to act prospectively. *Pohutski v. City of Allen Park*, 641 N.W.2d 219, 234 (Mich. 2002). However, the general rule of prospectivity does not apply to statutes or amendments that are remedial or procedural. *Travis v. Preston*, 643 N.W.2d 235, 240 (Mich. Ct. App. 2002).

It has been long settled that Michigan statutory proceedings on a sale of tax delinquent land "is a remedy for the delinquency of the taxpayer." *Muirhand v. Sands*, 69 N.W. 826, 828 (Mich. 1897). The state law affecting the remedy for the delinquency of property taxes is subject to amendment that may be given retroactive effect without destroying vested rights. *Id.*; *City of Detroit v. Walker*, 520 N.W.2d 135, 144-145 (Mich. 1994); *Baker v. State Land Office Board*, 293 N.W. 763, 767-768 (Mich. 1940); *Webster v. Auditor General*, 80 N.W. 705, 706-707 (Mich. 1899).

Mich. Comp. Laws § 211.78(g)(1) and the Bulletin thereunder effected a procedural change to the county's in rem remedy for property tax delinquency under the GPTA and may be applied retroactively.

The delinquent 1997 county taxes still remained a lien and an obligation to the County Treasurer. The County Treasurer retained an in personam collection remedy. The County Treasurer in fact received full payment of that delinquent tax obligation.

A retroactive application of the Commission Rule to the Treasurer's interests would pass muster under the standard employed by this Court in *U.S. v. Carlton*, 512 U.S. 26, 30-31 (1994), when evaluating retroactive federal tax legislation. The retroactive application of the Tax Commission rule is justified by a rational legislative purpose. It was not arbitrary or illegitimate. On its face, the Tax Bulletin is curative. It was clearly intended to prevent publicly owned and developed assets, particularly assets which serve the public, from being lost to the public through a mistaken administration of the tax collection program. The economy of a municipality is certainly not strengthened, by selling vital, publicly owned land and facilities at tax auction at great financial loss to the public.

The interests of the County Treasurer is not that of a private litigant with private expectations. In collecting delinquent county taxes, the Treasurer acts as the agent of the State. The greater protection against retroactivity ordinarily afforded a private litigant is hence inapplicable in this case. *See generally Jorge Aledo-Garcia v. Puerto Rico National Guard Fund*, 887 F.2d 354, 356 (1st Cir. 1989).

The legitimate legislative purpose is furthered by rational means. The Treasurer effects a cancellation of forfeiture of publicly owned property. In the instant case, Petitioner had notice, under existing state law and rules in effect prior to the auction, of the duty of the Treasurer to cancel the forfeiture of publicly owned land. The Treasurer effected a full return of the auction payment to Petitioner. The Treasurer received payment of the property tax delinquency. No harsh or oppressive result obtained here.

IV. THE PETITION SHOULD BE DENIED AS THE TRIAL COURT'S JUDGMENT CORRECTLY SET ASIDE THE TREASURER'S FORFEITURE AND FORECLOSE OF THE PUBLIC GARAGE ON AN INDEPENDENT GROUND.

The Michigan Supreme Court reversed the Michigan Court of Appeals and reinstated the judgment of the trial court. The judgment of the trial court correctly set aside the County Treasurer's forfeiture, foreclosure, and auction sale of the public garage. The trial court did so on the express basis that the County Treasurer failed to give the City its due process and statutory rights to notice of the pendency of foreclosure proceedings and of its statutory right to redeem. (Petitioner's Appendix 56a-57a). The judgment of the trial court is justified and supportable on this alternative and independent ground.

The City possessed a sufficient, identifiable property interest protected by due process. It was

undisputed that the County Treasurer failed to perform the public record search required by Mich. Comp. Laws §§ 211.78(i)(6)(c) and (d). (Petitioner's Appendix 50a). The trial court correctly ruled that the County Treasurer's means of providing service, namely, publication, and a posting on a weekend when the garage was closed, were not reasonably calculated to provide notice of the foreclosure proceedings to an ascertainable interest holder. (Petitioner's Appendix 53a). *See generally Jones v. Flowers*, 547 U.S. 220, 226 (2006); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983); *Sidun v. Wayne County Treasurer*, ___ N.W.2d ___ (Michigan Supreme Court No. 131905, released July 2, 2008); *Dow v. Michigan*, 240 N.W.2d 450 (Mich. 1976). Since the City had not been provided with the notice of forfeiture and foreclosure proceedings, or notice of its statutory redemption rights, as required by the GPTA and by the due process guarantees of the federal and state constitutions, the trial court properly set aside the judgment of foreclosure and granted the City an opportunity to redeem the property. *See generally In re Petition by Wayne Co. Treasurer*, 732 N.W.2d 458 (Mich. 2007).

CONCLUSION

Petitioner has not demonstrated any compelling reason for this Court to grant the Petition for Writ of Certiorari. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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DATED: July 24, 2008